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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES BASTEK, RUSSELL KOWAL, CHRISTOPHER PAWELSKI and MICHAEL PILLMEIER, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

FEDERAL CROP INSURANCE CORPORATION and DAN GLICKMAN, solely in his capacity as Secretary of Agriculture,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Before filing suit in the district court to contest Federal Crop Insurance Corporation ("FCIC") policies affecting crop insurance determinations, must farmers first exhaust administrative appeals through the National Appeals Division ("NAD") of the Department of Agriculture despite a statute providing that matters of "general applicability" are not appealable to the NAD, and a regulation which provides that such appeals to the NAD may not even be "sought", which regulation the government failed to cite to the Court of Appeals?

2. Is exhaustion of administrative appeals mandated in all instances from an adverse FCIC decision despite a separate jurisdictional statute authorizing suit in district court directly from the original determination, where no individual claims for benefits are asserted, and where exhaustion would be a futile exercise in formality?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners James Bastek, Russell Kowal, Christopher Pawelski, and Michael Pillmeier, on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 22, 1998.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals (A.1-11)[1] is reported at 145 F.3d 90 (2d Cir. 1998). The Court of Appeals affirmed the decision and order of the Southern District of New York (A.12-19), which is reported at 975 F. Supp. 534 (S.D.N.Y. 1997).

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] References to the Appendix to this petition are referred to herein as (A.___).

STATUTES AND REGULATIONS

The text of the pertinent provisions of 7 U.S.C. chapter 36; 7 U.S.C. subchapter VIII; 7 C.F.R. Subtitle A, Part 11; and 7 C.F.R. chapters IV and VII, are set forth in the Appendix to this petition.

STATEMENT OF THE CASE

Introduction

Petitioners are onion farmers situate in Orange County, New York ("Farmers"), whose crops were destroyed by severe weather conditions during the 1996 planting season. (A.2). They filed claims under the federal crop insurance program administered by the Federal Crop Insurance Corporation ("FCIC") (A.4), but their indemnities were dramatically reduced by calculations and deductions which, they contend, contravene the specific requirements and mathematical formula contained in the Federal Crop Insurance Act ("Act"). Following protest to the Secretary of Agriculture and the FCIC Administrator, the Farmers were informed in writing that the calculations and policies would not be altered.

The Farmers' suit for class-wide declaratory relief, challenging these specific FCIC policies, was dismissed by the district court on the ground that they had failed to exhaust administrative remedies before seeking judicial relief.

Despite a statute providing that matters of "general applicability" are not administratively appealable, the Court of Appeals affirmed, in an unprecedented decision without citation of authority, ruling that the Farmers were required to have pursued futile administrative appeals and awaited

inevitable administrative dismissal on the ground of nonappealability before seeking review in the district court. This ruling, which Congress could never possibly have intended, is inconsistent with the statutory and regulatory scheme, and renders void a specific jurisdictional statute allowing direct review in the district court of adverse FCIC decisions.

The Court of Appeals' decision imposes procedural impediments on farmers who wish to contest FCIC policy affecting indemnities which, in most cases, will make judicial review impossible. America's farmlands have been plagued by catastrophic natural disasters during the current growing season. FCIC policy affecting the adjudication of inevitable indemnity claims should comply with statutes rather than budgetary or political considerations, and should be subject to judicial review as provided by statute.

The Farmers and Their Crop Losses[2]

Petitioners are a class of family onion farmers in Orange County, New York. Because of an unprecedented series of disastrous weather events during the 1996 growing season, substantial portions of their onion crops were destroyed. Many farmers lost all, or substantially all, of their

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[2] The facts are taken from the complaint, amplified by the several documents submitted to the court in connection with the motion. In adjudicating a motion to dismiss, the facts alleged in the complaint are presumed to be true, and all reasonable inferences therefrom are to be drawn in favor of the plaintiffs. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 101-02 (1957); Sheppard v. Beerman, 94 F.3d 823, 827 (2d Cir. 1996).

crops. These disasters were replicated in the 1998 planting season. Farm Journal (Sept. 1998) 6.

The Federal Crop Insurance Program

The Federal Crop Insurance Act ("Act"), 7 U.S.C. §1501 et seq., was enacted in 1938 with the stated purpose of improving the economic stability of agriculture through a sound system of crop insurance. 7 U.S.C. §1502. It was passed in response to a series of droughts that coincided with the Great Depression when an unprecedented number of farm foreclosures threatened the food supply of the United States. The Act requires that the FCIC offer "catastrophic risk protection" to insure against "drought, flood, or other natural disaster" as part of the government's disaster safety net for farmers. 7 U.S.C. §1508(b)(1).

Catastrophic risk coverage is offered by local field offices of the Department of Agriculture, and by FCIC-approved private insurance providers, subject to FCIC review and control. 7 U.S.C. §1508 (b)(4) and (h)(3).

The statutory insurance is not intended to fully compensate a farmer for losses occasioned by natural disasters; it is designed to provide only sufficient compensation to enable him to maintain the farm and thus fulfill the statutory purpose of "improving the economic stability of agriculture". 7 U.S.C. §1502. Accordingly, the amount of coverage fixed by the Act for catastrophic risk protection during the 1996 crop year was "coverage for a 50 percent loss in yield, on an individual yield or area yield

basis, indemnified at 60 percent of the expected market price, or a comparable coverage ..." 7 U.S.C. §1508(b)(2)(A)(i).[3]

The regulations promulgated under the Act, 7 C.F.R. part 400 et seq., set forth the terms and conditions of the catastrophic risk protection endorsement and state, in terms parallel to the statute, that "[n]otwithstanding any provision contained in any other policy document, for the 1995 through 1998 crop years, coverage will be equal to fifty percent (50%) of your approved yield indemnified at sixty percent (60%) of the expected market price, or a comparable coverage as established by FCIC." 7 C.F.R. 402.4(4)(a).

FCIC's Wrongful Calculations

Under the Act, at the beginning of each growing season, the FCIC must "establish a price level for each commodity on which insurance is offered that -- (A) shall not be less than the projected market price for the commodity (as determined by the [FCIC]); or (B) at the discretion of the [FCIC], may be based on the actual market price at the time of harvest (as determined by the [FCIC])". 7 U.S.C. §1508(c)(5).

At the beginning of the 1996 growing season, the FCIC wrongfully fixed the Orange County yellow onion expected market price (also called a "price election") at $4.85 per hundred weight ("cwt."), although the actual market rate

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[3] This simple formula is consistent with the statutory mandate that the FCIC "minimize the paperwork required and the complexity and costs of procedures governing applications for processing and servicing of the plan for all parties involved." 7 U.S.C. §1508(b)(10)(A).

during the summer of 1996 for yellow onions was $12.00 per cwt., a price generally consistent with market prices for yellow onions over the past several years. (A.23). Similarly, the FCIC determined the red onion expected market price at $6.85 per cwt., although the actual market price for such onions was $20.00 per cwt., a price also consistent with historical market prices.

The indemnity calculation under the Act is plain and simple. Each farmer who has suffered a crop loss of 50% or greater is to receive an indemnity equal to 60% of expected market price on a 50% loss of expected yield. The Act enumerates only one permissible deduction from such indemnity, which is not applicable here[4]. Nevertheless, the FCIC arbitrarily deducted from the indemnity it proposed to pay each farmer an amount based upon a calculation involving that portion, if any, of the farmer's onion crop which was not destroyed, using what it calls "adjusted production to count" or "salvageable production," and computing this deduction using actual market prices for onions, which were about 2½ times greater than the "price election" used to calculate basic indemnities. The net effect of the FCIC's deduction was to dramatically reduce indemnities so that a farmer losing 75% of his crop received nothing, although the Act mandates that farmers losing more than 50% of their crops are to be compensated.

The effect of the FCIC's two departures from the clear dictates of the Act is dramatic. The complaint alleges that plaintiff James Bastek was entitled to indemnity payments

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[4] Under 7 U.S.C. § 1508(b)(2)(B), an indemnity may be reduced by the amount of out-of-pocket expenses not incurred by a farmer as a result of not planting, growing or harvesting the crop.

totaling $75,968.28, but that the FCIC intended to pay him nothing; Russell Kowal was owed $49,888.80 and was to be paid only $2,412.10; Christopher Pawelski was due $37,346.40, but the FCIC chose to pay him only $7,114.95; and Michael Pillmeier should have been paid $19,848.20, but the government wished to pay him only $6,681.36.

The Ackerman Letter

The FCIC's indemnity calculations were made known to the Farmers in an August 5, 1996 newsletter from the FCIC's local representative, the Orange County Farm Service Agency. (A.4).

In an attempt to persuade the government to correct its policies and adjudicate the Farmers' claims in accordance with the Act, on November 1, 1996, counsel for the Farmers wrote to Dan Glickman, Secretary of Agriculture, and Kenneth D. Ackerman, Manager of the FCIC and Acting Administrator of the USDA's Risk Management Agency. (A.20-29). The letter asked that the FCIC use realistic market prices in computing indemnities and abandon its arbitrary deduction of a purported "salvage value".

On December 11, 1996, Mr. Ackerman responded on behalf of himself and Secretary Glickman. A.30-34. He acknowledged the catastrophic conditions faced by the Farmers (A.30), but unequivocally stated that the FCIC's policies used in determining their claims would not be reconsidered. He noted that the "price election" or "established market price" is set "at the beginning of the crop year" (A.31), that the farmers "knew exactly what their total amount of protection would be" when they subscribed (A.33), and that it would not be changed. (A.33). With respect to the deduction for "salvage value" or "production to count",

he did not dispute that such a deduction is unauthorized by the Act, but he stated that the procedure was "outlined briefly" in an Onion Endorsement to the General Crop Insurance Policy. (A.31). He noted that the August 5, 1996, Orange County Farm Service Agency circular, which used the term "salvageable production", set forth incorrect calculations (A.31), and he set forth the "correct" calculation of the deductions.[5] Finally, his letter noted that the Secretary had

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[5] The FCIC's complicated calculation is made by computing "adjusted production to count". This is derived by multiplying a farmer's actual salable production by the larger of the "price election" for such onions fixed by the FCIC or the "local market field run price" and dividing this product by the "price election". Since the "local market field run price" closely approximates the actual market price realized by the farmer for his surviving crop (about $12.00 per cwt. for yellow onions and $20.00 per cwt. for red onions) and is much larger than the FCIC's deflated "price election" ($4.85 per cwt. for yellow onions and $6.85 for red onions), the FCIC's calculation yields an "adjusted production to count" which is approximately 70% larger than a farmer's actual salable crop. That figure is then deducted from the 50% of expected yield which the farmer realized during past years ("approved yield"). The FCIC then multiplies this grossly reduced loss by 60% of the FCIC's calculation of the "price election", which amounts to $2.91 per cwt. for yellow onions and $4.11 per cwt. for red onions. (A.31-33).

declared Orange County a disaster area, entitling the eligible farmers to apply for loans.[6]

When the Farmers individually presented their indemnity claims to the FCIC, calculated on the basis of reasonably expected market prices, and without deducting any salvage factor, those claims were denied in writing by Larry N. Atkinson, Director of the Raleigh Regional Service Office of the USDA's Risk Management Agency, following the procedures outlined in the Ackerman letter. Thus, the Farmers were informed by letter, in some cases after the complaint was filed, that:

> ...the established price was published and available to policyholders well before the deadline for cancellation or purchasing additional insurance. The price becomes part of the insurance contract and we cannot change it once insurance attaches.
>
> We also do not have the latitude to modify policy language regarding salvage value determination.

(A.39).

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[6] Low-interest government loans are frequently unavailable and unattractive to farmers. To qualify, farmers must have suffered a 30% loss, been turned down by two commercial banks, and demonstrate ability to repay. Those who have had a government loan written down in the past need not apply. The Times-Picayune, A.14, July 30, 1998; AP Online, "Feds Urge Crop Insurance Reform," July 29, 1998.

Unavailability of Administrative Review

The National Appeals Division of the Department of Agriculture ("NAD") has jurisdiction to review decisions rendered by the agency that are adverse to individual participants, 7 U.S.C. §6991, et seq., but the relief sought by the Farmers in this case could not be obtained in that appellate process.

The discrete issues presented are not the review of determinations concerning individual farmers; they concern challenges to "program policy" and issues of "general applicability" involving the application of mathematical formulas and thus, pursuant to 7 U.S.C. §6992(d) and 7 C.F.R. §780.2(c), (d) and (e), are barred from review by the NAD under its limited statutory authority. This distinction explains the presence of a separate federal jurisdiction provision within the Act, 7 U.S.C. §1508(j)(2)(A), which is separate from the provision allowing judicial review under the Administrative Procedure Act of final determinations by the NAD, 7 U.S.C. §6999. If every determination by the FCIC were administratively reviewable, as the Court of Appeals has ruled, there would be no office for the separate jurisdictional provision under §1508(j)(2)(A).

The administrative process contains no mechanism for class-wide relief. Indeed, the Appeal Regulations governing the FCIC expressly prohibit anyone from seeking review "of any general program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants." 7 C.F.R. §780.2(c). Only individual participants have a right to appeal. 7 C.F.R. §780.2(e). Moreover, even the individual claims of the Farmers, based upon the FCIC's arbitrary formula, could not be appealed because Appeal Regulations prohibit appeals from decisions

based on the application of mathematical formulas. 7 C.F.R. §780.2(d).

Because the Farmers were challenging a policy "applicable to all similarly situated participants", and decisions based solely on the application of mathematical formulas, they were not required, or even permitted, to pursue administrative appeals. Instead, the Farmers filed their complaint in federal district court seeking a declaratory judgment requiring the FCIC to use realistic 1996 expected market values for the crops, and that the FCIC not deduct any amounts for "salvage factor" or any other factor not authorized by the Act.

The District Court Decision

The government moved for judgment on the pleadings, pursuant to Rule 12(c), Fed. R. Civ. P., seeking dismissal on the ground that the court lacked subject matter jurisdiction because the Farmers had not exhausted administrative appeals. (A.14). The government argued that, under 7 U.S.C. §6912(e), exhaustion is required in all cases.

The district court's decision only addressed the exhaustion issue. It stated that the exhaustion analysis involves consideration of the purposes of the doctrine, and that when even one of the purposes is not furthered, exhaustion is not normally required. After setting forth the general exceptions to exhaustion articulated by this Court in McCarthy v. Madigan, 503 U.S. 140, 147-48, 112 S. Ct. 1081, 1087-88 (1992), the court stated, without analysis, "that resolution of the matters at issue here could well have been facilitated by the development of a factual record by the Department of Agriculture, which has specialized expertise in the area of crop pricing." (A.15-17).

The district court rejected the Farmers' argument "that the issue of 'salvage value' is a purely legal issue implicating only statutory interpretation", stating, without reference to any provision of the Act, that "[t]he use of what plaintiffs term 'salvage value' appears to be, in actuality, part of the indemnity calculation outlined in the Act, making factual development on this question clearly helpful to further review, whether administrative or judicial". (A.17).

Addressing the Farmers' futility argument, the district court found that the Ackerman Letter "was written in response to general concerns and takes the form of an explanation of the catastrophic risk protection program, rather than a review of these plaintiffs' claims." (A.17).

Although the district court recognized that the Farmers had no further opportunity for administrative relief, it concluded that the principle of exhaustion was more important, and it dismissed the complaint.

The Court of Appeals Opinion

Unlike the district court, the Court of Appeals did not apply the judicial exceptions to the exhaustion doctrine. It ruled that the explicit exhaustion requirement contained in 7 U.S.C. §6912(e) foreclosed such inquiry. (A.9).

The Court then addressed the Farmers' contention that the two issues raised in their complaint were matters of "general applicability" which are not appealable to the NAD under 7 U.S.C. §6992(d). It rejected the Farmers' argument that in such cases plaintiffs were free to go directly to the district court under 7 U.S.C. §1508(j)(2)(A). The Court ruled that even the question of whether the Farmers'

challenges were appealable administratively must itself be determined through administrative appeals. (A.10).

This ruling leaves §7 U.S.C. §1508(j)(2)(A), which authorizes direct appeal to district courts from unfavorable FCIC crop insurance determinations, with no circumstances in which it applies. This result follows from the Court of Appeals' ruling that all FCIC decisions must be appealed to the NAD, because NAD determinations are reviewed by district courts in accordance with the Administrative Procedures Act under 7 U.S.C. §6999. In its decision, the Court made no mention of the jurisdictional statute it had rendered superfluous.

In reaching its determination that even when faced with an unfavorable FCIC ruling in a matter of "general applicability" a farmer is required to first appeal to the NAD, the Court of Appeals did not have before it Department of Agriculture Regulations specifically providing, to the contrary, that in such circumstances an administrative appeal may not even be "sought." 7 C.F.R. §780.2(c) and (d).

REASONS FOR GRANTING THE WRIT

I

THE ISSUES OF STATUTORY CONSTRUCTION IMPLICATE A SIGNIFICANT NATIONAL INTEREST IN PRESERVING FARMS

The Court of Appeals' decision imposes such enormous procedural burdens upon Farmers who wish to appeal adverse crop insurance determinations by the FCIC involving issues of "general applicability" as to effectively

preclude review. In a season when thousands of farmers throughout the country will be filing crop insurance claims, the FCIC must be required to honor these claims in accordance with its governing statutes. If the FCIC is permitted to rewrite statutes to reduce indemnities as it has done in this case, and if the Court of Appeals' decision, which is inconsistent with the statutory scheme and expressed Congressional intent, is left standing to preclude effective review, thousands of farmers will lose the safety net of crop insurance.

The practical effect of requiring farmers to pursue successive appeals through the multi-layered NAD before commencing litigation in the district court is to impose a prohibitively expensive and time-consuming process upon them. In a case where a farmer is contesting a policy, formula or other matter of "general applicability", all of these appeals are doomed to certain failure; they will all be dismissed as nonappealable under 7 U.S.C. §6992(d).

Nor are these appeals simple matters. At oral argument before the Court of Appeals, in response to questions from the bench, the government attorney admitted that before the NAD a separate hearing before one of several hearing examiners would be held for the case of each farmer (A.48, 53-55). Class actions are not allowed. 7 C.F.R. §780.2(c). Few farmers can afford such an undertaking. Cf. 7 U.S.C. §1508(b)(10)(A), requiring the FCIC to minimize complexity and costs in processing and servicing crop insurance.

Repeatedly invoking FCIC v. Merrill, 332 U.S. 380, 68 S. Ct. 1 (1947), this Court's last consideration of the Act, the government argued to the Court of Appeals that it has complete discretionary authority to determine, by regulation, the prices, costs, and values with respect to crop indemnity

calculations, that the Farmers are charged with knowledge of all FCIC regulations, and that the determination whether a claim "is a matter of general applicability," 7 U.S.C. §6992(d), which the government claims the Farmers were required to obtain from the Director, is "administratively final", and not subject to review by this or any Court.

Merrill holds that the agency may define "the terms and conditions" upon which governmental insurance may be had, but neither Merrill, nor any other authority authorizes an agency to regulate inconsistently with its governing statute. See Southeastern Community College v. Davis, 442 U.S. 397, 411-12, 99 S. Ct. 2361, 2369-70 (1979); Foster v. Celani, 849 F.2d 91 (2d Cir. 1988).

The FCIC, relying on its power to set prices, contends that its calculations and deductions for salvage value, contained in an endorsement to the policy, can override the calculation for indemnity explicably set forth in the statute and its own regulations, i.e., 60% of the expected price for a 50% loss in yield, 7 U.S.C. §1508(b)(2)(A)(i); 7 C.F.R. 402.4(4)(a), and thus eviscerate the Congressional intent to provide meaningful crop insurance to farmers.

The government's argument, adopted by the Court of Appeals, that every decision of the agency must first be administratively appealed, is contrary to the statutory and regulatory framework. The Appeal Regulations provide unequivocally that:

> (c) No reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants. (Emphasis added).

7 C.F.R. §780.2(c). Thus, the Court of Appeals has ruled that petitioners were required to seek administrative appeals which the department regulations specifically state they may not seek.

7 C.F.R. §780.2(d) provides:

> Mathematical formulas established under a statute or program regulations, and decisions based solely on the application of those formulas, are not appealable under this part.

Petitioners, under the terms of this provision, were likewise precluded from seeking administrative review of the FCIC's indemnity calculations.

The Court of Appeals, without considering whether the Farmers' claims were of general applicability, ruled that the Farmers were required, as a threshold matter, to obtain a determination as to appealability from the Director.

In so ruling, the Court of Appeals did not have the benefit of 7 C.F.R. §§780.2(c), (d) or (e) of the Appeal Regulations quoted above, which contradict its holding that every decision of the FCIC must be administratively appealed. The government did not bring these controlling provisions to the attention of either of the lower courts, and petitioners were unaware that administrative review was constrained other than by the Rules of Procedure governing the NAD. The government, however, had "an affirmative duty to inform the court of controlling precedents, including the agency's own rules and regulations." Chennareddy v. Bowsher, 935 F.2d 315, 320 (D.C. Cir. 1991). Where the government fails to bring such rules and regulations to the Court's attention, it may not claim that a litigant has waived the right to rely on a regulation excusing exhaustion of administrative remedies.

Id. This is precisely what the government has done here. It buried the provisions of 7 C.F.R. §780.2(c), (d) and (e) in a tome of statutes and regulations appended to its Court of Appeals brief, failed to reference the provisions in its brief, and sat idly by while the Court of Appeals made a clearly erroneous ruling, which will negatively impact the rights of farmers throughout the United States to challenge FCIC policy which limits indemnities.

The statutes and regulations which the Court below did consider also indicate that matters of "general applicability" are "not subject to appeal." 7 U.S.C. §6992(d). Rule 11.13(b) of the Rules of Procedure of the NAD provides:

> An appellant may not seek judicial review of any adverse decision **appealable under this part** without receiving a final determination from the Division pursuant to the procedures of this part. (Emphasis added).

If, as the Court of Appeals has ruled, every adverse decision were appealable to the NAD, the highlighted language above would be superfluous.

The fact that there are two separate statutes which authorize district court review of FCIC determinations is consistent with this understanding of the regulatory scheme, and inconsistent with the Court of Appeals' holding. Title 7 U.S.C. §6999 provides for district court review of final determinations by the NAD under the Administrative Procedure Act (5 USC Chapter 7). Title 7 U.S.C. §1508(j)(2)(A) provides for direct district court review of

indemnity claims.[7] The Court of Appeals' interpretation renders the latter section meaningless; it holds that all appeals must pass through the NAD.

This Court has consistently insisted that statutory language must be construed to give effect to the Congressional intent and that the starting point for statutory construction is the language adopted by Congress. United States v. American Trucking Ass'ns., 310 U.S. 534, 542, 60 S. Ct. 1059, 1063 (1940). Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S. Ct. 2479 (1979).

The government's construction of 7 U.S.C. §§6992(d), 6999, and 1508(j)(2)(A), as well as its selective presentation of its rules and regulations, violate the cardinal presumption of statutory construction that Congress does not enact superfluous provisions and that every word or provision must be given effect. See, e.g., Bailey v. U.S., 516 U.S. 137, 116 S. Ct. 501 (1995).

There are compelling national reasons for this Court to reassert the principles that agencies may only regulate consistent with Congressional intent, and that statutory language may not be disregarded or interpreted to undermine

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[7] The government claimed below that §1508(j)(2)(A) is merely a venue provision. However, this jurisdictional section has been a part of the Act, in virtually the same language, since 1938. See 7 U.S.C. §1508(c) 52 Stat. 74 (1938). Until 1994, this provision was the only jurisdiction provision in the Act. At that time, as a part of the Reform and Reorganization Acts, in which the NAD was created and §6999 (requiring administrative exhaustion) was adopted, §1508(j)(2)(A) was reenacted in its present form.

the statute's primary purpose and to deny worthy litigants their day in court.

Guided by considerations of actuarial soundness as opposed to legislative intent, the government's indemnity calculations have devastated farmers throughout the land. During Congressional hearings in July 1998, a Minnesota farmer testified he paid $20,000 for federal crop insurance, but received only a $6,000 indemnity, against $90,000 in losses. The Times Picayune A.14 July 30, 1998. Farmers, like petitioners, cannot survive when there is no meaningful insurance for crop losses due to natural disasters.

The Secretary of Agriculture has admitted the failure of the federal crop insurance program, as currently applied. Confronted by a persistent drought that has seen billions of dollars in direct farmer and economic losses in Oklahoma and Texas, wheat disease in the upper Midwest, and other weather-related farm losses, Secretary Glickman conceded earlier this month that, "Crop insurance does not work very well. Agriculture is not well protected against acts of God." Associated Press, August 2, 1998. The cruel irony in Secretary Glickman's statement is that the Act is specifically intended to provide "catastrophic risk protection" against such natural disasters, and it would perform as intended if the indemnities required under the Act were actually paid to farmers.

In a prepared statement to the Department of Agriculture, Secretary Glickman predicted that many farmers and ranches "may not be in business next year," partly because the "current crop insurance program does not appear to provide sufficient protection at an affordable rate to prevent many farm failures." Federal News Service, July 30, 1998.

Last month, President Clinton reported that farmers in his home state characterized the federal crop insurance program as a "joke". The President rejected Secretary Glickman's explanation that the federal crop insurance program must be actuarially sound as contrary to the intent of Congress. The President underscored the vital contribution that farmers have made to America and the need to provide meaningful federal crop insurance:

> Our farm communities feed our nation and most of the world. They also nourish the values on which our country was born, and which had led us now for over 220 years -- hard work, and faith, and family, devotion to community and to the land. We simply can't flourish if we let our rural roots shrivel and decline.

M2 Presswire, July 27, 1998.

Given the dire conditions currently facing farmers and the failure of the federal crop insurance program to provide meaningful relief, as acknowledged by President Clinton and Secretary Glickman, the dissenting opinion of Justice Jackson in Merrill has proven profoundly prophetic.

In that case, Justice Jackson stated that if a farmer were required to peruse the Federal Register "to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant his crops." Justice Jackson insisted that the FCIC must engage in "fair dealing" lest crop insurance become "an investment in disapportionment." He concluded:

> In this case, the Government entered a field which required the issuance of large numbers

> of insurance policies to people engaged in agriculture. It could not expect them to be lawyers, except in rare instances, and one should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all. . . . It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

Id., 332 U.S. at 387-88, 68 S. Ct. at 5. (Jackson, J. dissenting).

II

WHETHER STATUTORY EXHAUSTION IS ABSOLUTE OR SUBJECT TO EXCEPTIONS SHOULD BE CLARIFIED BY THE COURT

The Court of Appeals ruled that a statutory exhaustion requirement is entirely inflexible and not subject to exception even where, as here, the administrative scheme provides no remedy for the policy challenges raised by petitioners, no individual claims for benefits were asserted by petitioners, and the highest officers of the agency had predetermined the issue and stated in writing that the policy would not be changed.

The ruling of the court below is contrary to decisions of this Court which have considered judicial exceptions to the exhaustion doctrine even where the resort to administrative appeals was required by the core statute. In Bowen v. City of New York, 476 U.S. 467, 476, 106 S. Ct. 2022, 2027-28 (1986), this Court affirmed a waiver of exhaustion of "the

statutory exhaustion requirement" contained in 42 U.S.C. §405(g). Relying on its earlier decisions in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976) and Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457 (1975), which similarly waived statutorily-mandated exhaustion, this Court in Bowen explained that exhaustion should be waived where the lawsuit challenges an overall agency policy and the claims are "collateral" to any individual claims for benefits. 476 U.S. at 483-86, 106 S. Ct. at 2032-33. Although the statute at issue clearly mandated exhaustion and administrative appeals, this Court ruled that the "application of the exhaustion principle is 'intensely practical'" and "should also be guided by the policies underlying the exhaustion requirement." 476 U.S. at 484, 106 S. Ct. at 2032.

The decision of the Court of Appeals is also contrary to its own prior precedents where the court recognized exhaustion should be excused when a claim is collateral to a claim for benefits, exhaustion would be futile, or the parties would suffer irreparable harm if required to pursue administrative appeals. Pavano v. Shalala, 95 F.3d 147, 150 (2d Cir. 1996), Abbey v. Sullivan, 978 F.2d 37, 44 (2d Cir. 1992).

The Court below purported to derive its draconian exhaustion rule from this Court's rulings in Darby v. Cisneros, 509 U.S. 137, 113 S. Ct. 2539 (1993) and McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081 (1992). In Darby, this Court ruled that federal courts may not impose an exhaustion requirement under the APA where neither the relevant statute nor agency rules mandate exhaustion as a prerequisite to judicial review. In McCarthy, this Court ruled that a federal prisoner was not required to exhaust administrative remedies. In neither Darby nor McCarthy did this Court squarely hold that a statutory exhaustion requirement may never be waived, nor did this

Court evince an intent to overrule its earlier precedents where it applied judicial exceptions to statutorily-mandated exhaustion.

Litigants, whether the Farmers here or individuals challenging policies of the Social Security system as in Bowen, must know with certainty when they must exhaust administrative appeals or be barred from the federal courts. The Court of Appeals has adopted an absolute approach that is contrary to established precedent and which, unless promptly addressed by this Court, will create great confusion in both the administrative and judicial processes. At the very least, it will require litigants to pursue costly and time-consuming appeals, regardless of their futility, before they may seek judicial redress.

CONCLUSION

This Court should grant certiorari to review the decision of the Court of Appeals which is contrary to the crop insurance statutes and makes review of matters involving FCIC policy and procedure a costly exercise in futility.

Alternatively, this Court should grant certiorari, vacate the decision below, and remand for further consideration in light of 7 C.F.R. §§780.2(c), (d) and (e), not considered by the Court of Appeals.

Dated: New York, New York
August 19, 1998

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MAY 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: January 29, 1998 Decided: May 22, 1998)

Docket No. 97-6221

James Bastek, Russell Kowal, Christopher PAWELSKI, and MICHAEL PILLMEIER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Federal Crop Insurance Corporation and DAN GLICKMAN, solely in his capacity as Secretary of Agriculture,

Defendants-Appellees.

Before: CALABRESI, CABRANES, and HEANEY,* *Circuit Judges.*

* * *

JOSÉ A. CABRANES, *Circuit Judge:*

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* The Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

Plaintiffs James Bastek, Russell Kowal, Christopher Pawelski, and Michael Pillmeier appeal an order of the United States District Court for the Southern District of New York (Barrington D. Parker, Jr., *Judge*), dismissing their complaint for failure to exhaust administrative appeals pursuant to 7 U.S.C. § 6912(e). Plaintiffs, who are onion farmers, sought a declaratory judgment that the manner in which defendant Federal Crop Insurance Corporation ("FCIC") calculated indemnities due to plaintiffs as a result of the 1996 growing season failed to comply with the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 *et seq.* ("FCIA"). They assert that, notwithstanding the exhaustion requirement prescribed by the statute, the district court should have employed exceptions articulated by the courts in so-called common law (or "judicial") exhaustion cases to excuse plaintiffs from the statutory requirement. Defendants FCIC and Dan Glickman, the Secretary of Agriculture, argue that such exceptions are not applicable in the face of an explicit statutory mandate of exhaustion. We affirm the district court's dismissal of plaintiffs' complaint.

I.

Plaintiffs are onion farmers in Orange County, New York. Defendant FCIC is an agency of the United States Department of Agriculture, created to effect the purposes of the FCIA. *See id.* § 1503. Both the FCIC and Secretary Glickman are authorized to issue regulations implementing the FCIA, as amended by the Federal Crop Insurance Reform Act of 1994, Pub. L. No. 103-354, § 101(a), 108 Stat. 3179 (1994). *See id.* § 1506(p) (1994).

The FCIC offers various kinds of insurance coverage, and so-called catastrophic risk insurance provides the "minimum

level of coverage." 7 C.F.R. § 400.651. Under the FCIA, catastrophic risk insurance covers a "50 percent loss in yield . . . indemnified at 60 percent of the expected market price, *or a comparable coverage (as determined by the [FCIC])*." 7 U.S.C. § 1508(b)(2)(A) (emphasis added).

Plaintiffs Bastek, Kowal, and Pawelski purchased catastrophic risk insurance directly from the FCIC, and plaintiff Pillmeier obtained the same coverage from an FCIC-approved private insurance provider.[1] The 1996 growing season witnessed a catastrophe of the type contemplated by the insurance policies: a cold, wet spring gave way to both a late frost and an early heat wave in May. Two hailstorms in June and July and a

1. Defendants assert that plaintiff Pillmeier lacks standing to bring this action under the FCIA because he purchased his insurance coverage through an FCIC-approved private provider. The district court declined to address this issue. We resolve the matter here by determining that plaintiff Pillmeier has standing. 7 U.S.C. § 1508(j)(2)(A) provides, in pertinent part, that "if a claim for indemnity is denied by the Corporation *or an approved provider*, an action on the claim may be brought against the Corporation or the Secretary only in the United States district court for the district in which the insured farm is located." 7 U.S.C. § 1508(j)(2)(A) (emphasis added). The plain language of the statute thus contemplates that a plaintiff who purchased insurance coverage through an approved provider could bring suit against the FCIC or the Secretary of Agriculture in an appropriate district court. Further, plaintiff Pillmeier satisfies the three prerequisites to Article III standing: he alleges that he has suffered a concrete injury in fact; the alleged injury is fairly traceable to defendants' "complained-of conduct"; and it is likely the requested relief will redress the injury. *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016-17 (1998). The economic injury of which plaintiff Pillmeier complains was allegedly caused by the FCIC calculations he challenges. The declaratory judgment he seeks would require the FCIC to recalculate the indemnities due him, utilizing higher onion prices and eschewing deductions for salvage value—measures that would likely redress his injury.

tropical storm in mid-July completed the damage; the majority of plaintiffs' onion crops were destroyed. Secretary Glickman declared Orange County a disaster area.

In early November 1996, plaintiffs filed claims for recovery under their catastrophic risk insurance policies. Meanwhile, after reading a newsletter circulated by the Orange County Farm Service Agency (the "FSA"), plaintiff's counsel, Martin Gold, anticipated that plaintiffs would be awarded less than they desired. Accordingly, he wrote two letters on November 1, 1996: one to Kenneth D. Ackerman, Acting Administrator of the Risk Management Agency of the Department of Agriculture, and one to Secretary Glickman. Both letters took issue with the FCIC policies utilized by the FSA, as agent for the FCIC, to determine the amounts due claimants. The letters accused the FCIC of "arbitrarily using an unrealistic market price and improperly subtracting a salvage factor," resulting in "benefits to farmers which are generally less than 10% of what they should be." Gold asserted that this methodology violated both the FCIA and 7 C.F.R. § 402.4(4)(a), which provide that the farmers should be covered for 50% of the approved yield indemnified at 60% of the expected market price "or a comparable coverage" as determined by the FCIC.

Gold never heard directly from Secretary Glickman, but on December 11, 1996, he received a letter from Ackerman, thanking Gold for his letters to Ackerman and Glickman. After explaining the procedure for calculating onion indemnities pursuant to their policies, Ackerman defended the agency's calculation of the established market price for onions, noting that when plaintiffs purchased coverage, they knew what their coverage would be and had the option of purchasing a higher level of protection. The letter never mentioned the specific

details of plaintiffs' claims, focusing instead on the general procedure followed by the FCIC in calculating onion insurance indemnities. On January 21, 1997, Gold filed plaintiffs' complaint in the United States District Court for the Southern District of New York, claiming that the FCIC's calculation of the indemnities due to plaintiffs violated the FCIA, and primarily seeking a declaratory judgment requiring the FCIC to use "true" expected market prices ($12.00 per cwt.) rather than "arbitrary" expected market prices ($4.84 per cwt.) to calculate the indemnities.

One day later, Larry Atkinson, Director of the Raleigh Regional Service Office of the Department of Agriculture's Risk Management Agency, sent a letter to each individual plaintiff, notifying them that after "thorough review and careful consideration," the agency was unable to approve the claims submitted in November 1996 by each plaintiff. Atkinson defended the agency's calculation of established market price as based on available market data, and noted that the price was part of the insurance contract executed by the plaintiffs, as was the salvage value determination. The letter concluded by outlining three methods of contesting the agency's determination: plaintiffs could (1) file a written request for reconsideration with the Risk Management Agency within 30 days, (2) request appellate review by the National Appeals Division of the Department of Agriculture within 30 days, or (3) request mediation or alternative dispute resolution with the Risk Management Agency within 15 days.

Plaintiffs refrained from exercising any of these three administrative options, choosing instead to proceed with their case before the district court. The statute of limitations has now run on all three administrative review options.

Appendix A

II.

On August 28, 1997, Judge Parker granted defendants' Rule 12(c) motion for judgment on the pleadings. We review such dismissals *de novo*. *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). "All allegations in the complaint must be accepted as true; all inferences must be drawn in favor of the plaintiff; and dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks and citation omitted).

The statute governing administrative appeals falling under the FCIA provides that:

> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court of competent jurisdiction against—
>
> (1) the Secretary [of Agriculture];
>
> (2) the Department [of Agriculture]; or
>
> (3) an agency, office, officer, or employee of the Department [of Agriculture].

7 U.S.C. § 6912(e). Department of Agriculture regulations further provide that "[FCIA] program participants shall seek review of an adverse decision before a Hearing Officer of the

[National Appeals] Division,[2] and may seek further review by the Director, under the provisions of this part prior to seeking judicial review." 7 C.F.R. § 11.2(b).

In general, exhaustion of administrative remedies is the rule, and waiver the exception, because exhaustion serves myriad purposes, including limiting judicial interference in agency affairs, conserving judicial resources, and preventing the "frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency." *McKart v. United States*, 395 U.S. 185, 193-95 (1969); *see also Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996). Exhaustion also allows the agency to develop the factual record of the case, which aids such judicial review as may be available. *See James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137-38 (D.C. Cir. 1987).

Two kinds of exhaustion doctrine are currently applied by the courts, and the distinction between them is pivotal. Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Common law (or "judicial") exhaustion doctrine, in contrast, recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process.

The Supreme Court has directed that "[w]here Congress specifically mandates, exhaustion is required. But where

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2. The National Appeals Division ("NAD") is an agency of the Department of Agriculture, independent from all other Department of Agriculture agencies (such as the FCIC), and subject to the Secretary of Agriculture's supervision. *See* 7 C.F.R. § 11.2(a). The NAD Director reports directly to the Secretary of Agriculture. *See id.*

Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (internal citations omitted). With regard to cases governed by the Administrative Procedure Act ("APA"), such as the case at bar, the Supreme Court has instructed that if Congress has not enacted an explicit exhaustion requirement, courts may not exercise their judicial discretion to impose one. *See Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993). However, even in APA-governed cases, if the statute at issue explicitly mandates exhaustion as a prerequisite to judicial review, it must be enforced. *See id.*

Faced with unambiguous statutory language requiring exhaustion of administrative remedies, "[w]e are not free to rewrite the statutory text." *McNeil v. United States*, 508 U.S. 106, 111 (1993). Only in the absence of an explicit statutory exhaustion requirement may courts exercise discretion and "balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy*, 503 U.S. at 146. *See also id.* at 152 ("*Because Congress has not required exhaustion* . . . we turn to an evaluation of the individual and institutional interests at stake in this case.") (emphasis added); *Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997); *Portela-Gonzalez v. Secretary of the Navy*, 109 F.3d 74, 77 (1st Cir. 1997) ("[E]xhaustion of administrative remedies is absolutely required if explicitly mandated by Congress.").[3]

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3. As one noted commentator states, "[m]ost agency organic acts do not address exhaustion. When they do, however, courts are not free simply to apply the common law exhaustion doctrine with its pragmatic, judicially defined exceptions. Courts must, of course, apply the terms of the statute." II Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.3, at 318 (3d ed. 1994).

If Congress has *not* explicitly required exhaustion, judicial exhaustion doctrine provides that courts may, in their discretion, waive administrative exhaustion under certain circumstances.[4] However, the statutory provision mandating exhaustion contained in 7 U.S.C. § 6912(e) is explicit. Indeed, as one court has observed, "[i]t is hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before beginning a lawsuit." *Gleichman v. United States Dep't of Agric.*, 896 F. Supp. 42, 44 (D. Me. 1995). There can be little doubt that Congress's intent, in enacting this statute, was to require plaintiffs to exhaust all administrative remedies before bringing suit in federal court.

Accordingly, because the various exceptions to exhaustion urged by plaintiffs do not apply where, as here, a clear statutory exhaustion requirement exists, plaintiffs' arguments relying on these exceptions are unavailing. *See, e.g., Darby*, 509 U.S. at 153-54; *McCarthy*, 503 U.S. at 144; *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975); *Portela-Gonzalez*, 109 F.3d at 77; *Zipp v. Geske & Sons, Inc.*, 103 F.3d 1379, 1383 n.5 (7th Cir. 1997).

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4. Such circumstances occur when (1) requiring exhaustion would "occasion undue prejudice to subsequent assertion of a court action"; (2) the administrative remedy is inadequate because the agency cannot give effective relief, *e.g.*, (a) "it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"; (b) the challenge is to "the adequacy of the agency procedure itself"; or (c) the agency "lack[s] authority to grant the type of relief requested"; or (3) the agency is biased or has predetermined the issue (also known as "futility"). *McCarthy*, 503 U.S. at 146-48; *Swirsky v. National Ass'n of Securities Dealers*, 124 F.3d 59, 63 (1st Cir. 1997). Other circumstances potentially giving rise to a waiver of exhaustion occur when (4) "the claim is collateral to a demand for benefits," or (5) "plaintiffs would suffer irreparable harm if required to exhaust their administrative remedies." *Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992).

We note, moreover, that to the extent that plaintiffs seek to avoid the exhaustion requirement because they are challenging the FCIC's general policy of calculating indemnities, rather than individual benefit determinations, this issue is expressly addressed by 7 U.S.C. § 6992(d), which provides:

> If an officer, employee, or committee of an agency determines that a decision is not appealable and a participant appeals the decision to the Director, the Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal. The determination of the Director as to whether a decision is appealable shall be administratively final.

7 U.S.C. § 6992(d). Under the clear terms of the statute, plaintiffs' argument that their broad challenges to FCIC calculations could not adequately have been presented within normal administrative channels is itself an argument that was required to be tested and exhausted before being presented in federal court. Plaintiffs neither obtained a decision that their claims were too broad to be appealed administratively, nor did they appeal that decision to the Director.

III.

For the reasons stated above, we affirm the judgment of the district court dismissing plaintiffs' complaint. We are aware that, having failed to pursue their administrative remedies initially, plaintiffs are barred by the applicable statutes of limitation from pursuing them now. However, the choice to bring suit in the district court rather than exhausting the required administrative remedies—or, indeed, pursuing *both* remedies

at the same time as a precaution, as litigants often do, in the event that it is determined that exhaustion is required—was entirely plaintiffs' own. 7 U.S.C. § 6912(e) unambiguously required plaintiffs to exhaust their administrative remedies before bringing suit, and their failure to do so deprived them of the opportunity to obtain relief in the district court.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 28, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 CV 410 (BDP)

JAMES BASTEK, RUSSELL KOWAL, CHRISTOPHER PAWELSKI and MICHAEL PILLMEIER, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

FEDERAL CROP INSURANCE CORPORATION, and DAN GLICKMAN, solely in his capacity as Secretary of Agriculture,

Defendants.

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, JR., U.S.D.J.

Plaintiffs bring this action challenging the application of the indemnity provision of the Federal Crop Insurance Act ("the Act"), 7 U.S.C. § 1501 *et seq*. The Federal Crop Insurance Corporation ("FCIC") and Agriculture Secretary Dan Glickman (collectively "the Government") move to dismiss, pursuant to Fed. R. Civ. P. 12(c), on the basis that plaintiffs have failed to exhaust their administrative remedies.

Appendix B

BACKGROUND

Plaintiffs, who are onion farmers in Orange County, New York, obtained "catastrophic risk protection" from the FCIC as is provided for by the Act. Due to severe weather conditions, plaintiffs lost significant portions (fifty percent or more) of their 1996 crops and sought indemnity for those losses from the FCIC. Plaintiffs were compensated for their crop losses at the coverage level set forth in the Act, which states that "catastrophic risk protection shall offer a producer coverage for a 50 percent loss in yield, on an individual yield or area yield basis, indemnified at 60 percent of the expected market price, or a comparable coverage (as determined by the Corporation) . . . ." 7 U.S.C. § 1508 (b) (2) (A) (i).

Plaintiffs assert that the § 1508 (b) (2) (A) (i) indemnification calculation was improperly modified by deduction of what they term a "salvage value," which is the value of onions from plaintiffs' 1996 crops which were actually brought to market. The Government rejects the notion that the FCIC improperly injected "salvage value" into the calculation, but, rather, asserts that a deduction for the value of onions actually brought to market is provided for under the "comparable coverage" provision of § 1508 (b) (2) (A) (i).

In addition to objecting to the FCIC's use of "salvage value," plaintiffs assert that the FCIC employed an "unrealistically low market value" in calculating indemnity under the Act. The market price used in calculating the money owed plaintiffs was $6.85/cwt for red onions and $4.85/cwt for yellow onions.

On November 1, 1996, plaintiffs' attorney wrote to Secretary Glickman and Kenneth D. Ackerman, Manager of

the FCIC and Acting Administrator of the Department of Agriculture's Risk Management Agency ("RMA") challenging generally both the computation of market price and the use of a salvage value. Ackerman responded by a December 11, 1996 letter ("Ackerman letter"), in which he explained RMA's position with respect to these two issues. Then, on December 23, 1996, in response to a claim submitted, Larry N. Atkinson, Director of the RMA, wrote to plaintiff Christopher Pawelski denying his claim and outlining the process for reconsideration and/or appeal. Specifically, Atkinson explained that Pawelski could: (1) seek reconsideration by the Risk Management Agency within thirty days; (2) appeal to the regional director; or (3) request mediation or another form of alternative dispute resolution. By January 22, 1997 letters, Atkinson communicated essentially the same information to plaintiffs Russell Kowal and James Bastek. None of the plaintiffs pursued these options, but instead filed this lawsuit.

EXHAUSTION

Contending that plaintiffs have failed to exhaust their administrative remedies, the Government moves, pursuant to Fed. R. Civ. P. 12(c), to dismiss for lack of subject matter jurisdiction. The gravamen of the Government's argument is that it is immune from suit absent consent and that consent under the Act, as modified by the Agriculture Reorganization Act, 7 U.S.C. § 6901 *et seq.*, is premised upon exhaustion. *See Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The relevant portion of the Reorganization Act provides that "[n]ot withstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction. . . ." 7 U.S.C. § 6912(e).

Appendix B

Plaintiffs make two arguments in opposition to defendants' motion. First, plaintiffs contend that because "final agency action" has occurred, defendants are subject to suit. Second, they contend that the exhaustion requirement should be waived. Plaintiffs' first argument seems somewhat misplaced, as the Government's assertion of immunity is premised not on finality, but rather on the broader principle of exhaustion.

When conducting an exhaustion analysis, it is necessary to consider the purposes of exhaustion. *See Pavano v. Shalala*, 95 F.3d 147, 151 (2d Cir. 1996). Exhaustion is, of course, the rule, while waiver of exhaustion is the exception. *See Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992). However, when one of the purposes is not furthered, exhaustion is normally not required. "Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). In order to protect agency authority, it is necessary to

> allow [an] agency to apply its special expertise . . . [as well as allow] an agency [ ] to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court. Correlatively, exhaustion principles apply with special force when frequent and deliberate flouting of administrative processes could weaken an agency's effectiveness by encouraging disregard of its procedures.

Id. at 145 (citation and quotation marks omitted). Additionally, exhaustion promotes judicial efficiency by allowing for the possibility that a controversy will be mooted by agency review

and by "produc[ing] a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.*

Recognizing these purposes, the Supreme Court has articulated three general exceptions to exhaustion.

> First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action.
>
> . . .
>
> Second, an administrative remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief.
>
> . . .
>
> Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.

Id. at 147-48; *see also Howell v. Immigration and Naturalization Serv.*, 72 F.3d 288, 291 (2d Cir. 1995).

Plaintiffs contend that exhaustion should be waived in this case because the purposes of exhaustion would not be furthered if it were required. Specifically, they argue that there are no fact issues in dispute, making it unnecessary to have a factual record developed; that the "salvage factor issue involves only statutory

interpretation, [that is] [i]t is purely a matter of law, on which no fact finding or agency expertise is necessary;" and that exhaustion would be futile.

Having considered each of plaintiffs' arguments, both as presented in their motion papers and during oral argument, I find them to be without merit. I find that resolution of the matters at issue here could well have been facilitated by the development of a factual record by the Department of Agriculture, which has specialized expertise in the area of crop pricing. I note that exhaustion doctrine recognizes the value of this sort of factual development even when, at the end of the administrative proceedings, the case reaches federal court. *See McCarthy*, 503 U.S. at 145. Similarly, I reject the notion that the issue of "salvage value" is a purely legal issue implicating only statutory interpretation. The use of what plaintiffs term "salvage value" appears to be, in actuality, part of the indemnity calculation outlined in the Act, making factual development on this question clearly helpful to further review, whether administrative or judicial.

In support of their futility argument, plaintiffs rely almost exclusively on the Ackerman letter, which they contend demonstrates the "foregone conclusion" that plaintiffs' claims would not be reevaluated. The Ackerman letter, however, was written in response to general concerns and takes the form of an explanation of the catastrophic risk protection program, rather than a review of these plaintiffs' claims. In addition to the Ackerman letter, plaintiffs Bastek, Kowal, and Pawelski received individual determination letters from Atkinson, who included specific information regarding review and appeal procedures. There is no reason to presume, as do plaintiffs, that these procedures would, in fact, be futile, especially in light of the

strong presumption in favor of exhaustion and the deference to agency action it embodies.

Furthermore, plaintiffs overlook one of the main purposes of exhaustion, namely to allow agencies to correct their mistakes internally, without the oversight of the federal courts. *See McCarthy*, 503 U.S. at 145. If, as plaintiffs contend, the FCIC erred in its calculation of plaintiffs' indemnity under the catastrophic risk protection program, or for other reasons reached incorrect conclusions, the agency is entitled to the opportunity to correct errors that may have occurred. The fact these plaintiffs might no longer be entitled to agency review of their claims does not diminish the importance of allowing agencies to conduct internal review before "being haled into federal court."[1] *See Id.*

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1. In addition to a number of cases from outside this Circuit, plaintiffs rely on *Diapulse Corp. v. Food and Drug Administration*, 500 F.2d 75, 77-79 (2d Cir. 1974). *Diapulse*, however, is clearly distinguishable. In *Diapulse*, the court conducted a functional analysis of exhaustion doctrine and concluded that the primary purposes of exhaustion would not be met in that case. *Id.* The court relied on two significant factors, neither of which is present here. First, the *Diapulse* plaintiffs challenged an FDA policy of charging fees for record searches. The court found that as the issue presented was "whether the proposed fees were legally authorized, there is no need for the agency to develop a detailed factual record for purposes of decision, nor is there any area for the exercise of discretion. And, on this legal question of authorization, agency expertise is of little help to a reviewing court." *Id.* at 78. Second, the *Diapulse* court concluded that while there was administrative review available, the plaintiffs were not aware of such availability. *Id.* at 78. Here, the plaintiffs were notified of the avenues of review available to them.

Appendix B

CONCLUSION

For the reasons discussed above, defendants' motion to dismiss, pursuant to Fed. R. Civ. P. 12(c), is granted. The Clerk of the Court is directed to dismiss this action. Having dismissed this action, I decline to address the Government's arguments regarding the plaintiff Michael Pillmeier's standing.

SO ORDERED:

s/ Barrington D. Parker, Jr.
U.S.D.J.

Dated: White Plains, New York
August 28, 1997

APPENDIX C — LETTER FROM MARTIN R. GOLD OF GOLD, FARRELL & MARKS TO KENNETH D. ACKERMAN OF THE U.S. DEPARTMENT OF AGRICULTURE DATED NOVEMBER 1, 1996

GOLD, FARRELL & MARKS

[Letterhead omitted]

November 1, 1996

BY FACSIMILE AND MAIL

Mr. Kenneth D. Ackerman
U.S. Department of Agriculture
Acting Administrator, Risk Management Agency
1400 Independence Avenue SW
Room 3086 South Building
Washington, DC 20250

Re: ***Orange County Onion Crop Disaster***

Dear Mr. Ackerman:

We represent third and fourth generation family onion farmers in Orange County, New York, who have faced gigantic losses from the worst growing season in memory, largely as a result of hail storms during the Spring. This disaster has been compounded by calculations made by the Federal Crop Insurance Corporation ("FCIC") that render virtually worthless the onion crop insurance these farmers purchased. We request your assistance, and by separate letter to Agriculture Secretary Glickman have asked his assistance, in requiring that FCIC follow the law in calculating the crop insurance indemnity due these farmers. FCIC should use the true market value of 1996 yellow onions, and should eliminate its arbitrary use of a purported "salvage value" which it subtracts from the indemnity.

Appendix C

As you know, the Federal Crop Insurance Act, 7 U.S.C. 1501 et seq., was enacted to, *inter alia*, improve the economic stability of agriculture through a sound system of crop insurance. To carry out the purposes of the Act, FCIC is required to insure farmers against crop losses due to drought, flood or other natural disasters.

The amount of coverage provided under the Federal Crop Insurance Act for catastrophic risk protection in the 1996 crop year is "coverage for a 50 percent loss in yield, on an individual yield or area yield basis, indemnified at 60 percent of the expected market price, or a comparable coverage (as determined by the Corporation)". 7 U.S.C. 1508(b)(2)(A)(1).

The regulations promulgated under the statute, 7 C.F.R. part 400 *et seq.*, set forth the terms and conditions of the catastrophic risk protection endorsement, and echo the statute. They state that "[n]otwithstanding any provision contained in any other policy document, for the 1995 through 1996 crop years, coverage will be equal to fifty percent (50%) of your approved yield indemnified at sixty percent (60%) of the expected market price, or a comparable coverage as established by FCIC". 7 C.F.R. 402.4 (4)(a).

To protect the 1996 onion crops from adverse weather and other disasters the onion farmers of Orange County, New York applied and paid for catastrophic risk protection under the Federal Crop Insurance Act locally through the Orange County Farm Service Agency ("County Agency") acting as agent for FCIC. The application specified that the amount of insurance on the onion crop was 60% and the coverage level was 50%, as set forth in the governing statute and regulations.

The farmers' general crop insurance policies state that indemnities will be determined in accordance with the applicable crop endorsement and the actuarial table. The onion crop

endorsements set forth the applicable method of calculating indemnities. The endorsements provide that the market price utilized in the calculations may not be less than "local market price". Onion Endorsement at Paragraph 7. The endorsements make no mention of any salvage value or similar subtractions from benefits to be paid.

The farmers faced one weather crisis after another this growing season. Their 1996 onion crop was planted later than usual due to a cold, wet spring. In May, heavy rains ruined about 30 percent of the onion seedlings, requiring later replanting which was followed by a late frost and an early heat wave. The crisis turned to disaster when a pair of storms in June and July pelted the already weakened onion leaves with golf ball-sized hailstones. In mid-July tropical storm Bertha drenched Orange County with six inches of rain in half a day. Onion plants were knocked over, the roots exposed and rot crept into the onions. There was no way to save the onions and it was too late to replant.

Rainfall data compiled by the County Agency shows 30.84 inches of rainfall in Orange County during the first seven months of 1996, compared to 17.40 inches during the same period of 1995. Not only was the amount of rainfall significantly greater, but so was the frequency of precipitation. The County Agency reported precipitation on 43 days out of a possible 92 in May, June and July, 1996, as opposed to 27 days of precipitation in May through July 1995.

As a result of such adverse weather, the farmers' onion crops were destroyed, in whole or in major part.

The disaster was made worse when the County Agency determined indemnities due the farmers according to the following

Appendix C

calculation: Actual Production History multiplied by 50% (catastrophic coverage), multiplied by acreage grown, multiplied by the 1996 price set by FCIC (discussed in the next paragraph) resulting in the policy value, from which a purported "salvage value" (discussed below) was subtracted to yield the indemnity due the farmers.

FCIC seems to have arbitrarily determined the 1996 yellow onion price as $4.85 per hundred weight ("cwt"). The current actual market rate for yellow onions is $12-$18. FCIC then multiplies its deflated price of $4.85 cwt. by the 60% coverage to yield a price of $2.91 cwt. for 1996 yellow onions. Thus, the FCIC indemnity calculation is based on less than one-half the actual market price.

FCIC then subtracts its calculation of a factor it calls "salvage value", determined by multiplying the salvageable production (as determined by the federal crop insurance adjustor) by the FCIC-determined salvage rate of $8.00 per cwt (hereinafter the "salvage factor").

The salvage factor has no basis in the governing statute, the regulations, the general crop insurance policy, the onion endorsement, or anything else. Nor is it logical or equitable. By arbitrarily using an unrealistic market price and improperly subtracting a salvage factor, the FCIC proposes to pay benefits to farmers which are generally less than 10% of what they should be.

FCIC should value the crop at the current actual market rate, and calculate indemnities according to the explicit language and purpose of the statute, regulations and insurance policies.

Appendix C

We understand that the suggestion has been made that the government might correct the problem for future years, but that is not a solution. These are insured losses the government is obligated to pay now; it is not a question of waiting for the next round of appropriations. These family farmers are not asking for governmental largesse. They paid for and entered into binding contracts of insurance with the government which require the government to indemnify against a portion of crops lost as a result of natural disaster. The Congressional purpose in providing this insurance is to reduce the devastation farmers suffer from such disasters and enable them to maintain their farms. FCIC is violating the statute and undermining the clear Congressional intent.

We ask that you assist the Orange County family onion farmers, and ensure that FCIC uses realistic current market value and abandon its deduction of "salvage value" when calculating the crop insurance indemnity due yellow onion producers for the destroyed 1996 crop.

Thank you for your consideration of this important matter. Our clients and my office will be pleased to provide any further information you may request.

Respectfully,

s/ Martin R. Gold
Martin R. Gold

MRG:sc

APPENDIX D — LETTER FROM MARTIN R. GOLD OF GOLD, FARRELL & MARKS TO THE HONORABLE DAN GLICKMAN, SECRETARY OF AGRICULTURE DATED NOVEMBER 1, 1996

GOLD, FARRELL & MARKS

[Letterhead omitted]

November 1, 1996

BY FACSIMILE AND MAIL

The Honorable Dan Glickman
Secretary of Agriculture
U.S. Department of Agriculture - Room 200-A
1400 Independence Avenue S.W.
Washington, DC 20250

Re: *Orange County Onion Crop Disaster*

Dear Mr. Glickman:

We represent third and fourth generation family onion farmers in Orange County, New York who have faced gigantic losses from the worst growing season in memory, largely as a result of hail storms during the Spring. This disaster has been compounded by calculations made by the Federal Crop Insurance Corporation ("FCIC") that render virtually worthless the onion crop insurance these farmers purchased. We request your assistance in requiring that FCIC follow the law in calculating the crop insurance indemnity due these farmers. FCIC should use the true market value of 1996 yellow onions, and should eliminate its arbitrary use of a purported "salvage value" which it subtracts from the indemnity.

Appendix D

As you know, the Federal Crop Insurance Act, 7 U.S.C. 1501 et seq., was enacted to, *inter alia*, improve the economic stability of agriculture through a sound system of crop insurance. To carry out the purposes of the Act, FCIC is required to insure farmers against crop losses due to drought, flood or other natural disasters.

The amount of coverage provided under the Federal Crop Insurance Act for catastrophic risk protection in the 1996 crop year is "coverage for a 50 percent loss in yield, on an individual yield or area yield basis, indemnified at 60 percent of the expected market price, or a comparable coverage (as determined by the Corporation)". 7 U.S.C. 1508(b)(2)(A)(I).

The regulations promulgated under the statute, 7 C.F.R. part 400 *et seq.*, set forth the terms and conditions of the catastrophic risk protection endorsement, and echo the statute. They state that "[n]otwithstanding any provision contained in any other policy document, for the 1995 through 1996 crop years, coverage will be equal to fifty percent (50%) of your approved yield indemnified at sixty percent (60%) of the expected market price, or a comparable coverage as established by FCIC". 7 C.F.R. 402.4 (4) (a).

To protect the 1996 onion crops from adverse weather and other disasters the onion farmers of Orange County, New York applied and paid for catastrophic risk protection under the Federal Crop Insurance Act locally through the Orange County Farm Service Agency ("County Agency") acting as agent for FCIC. The application specified that the amount of insurance on the onion crop was 60% and the coverage level was 50%, as set forth in the governing statute and regulations.

The farmers' general crop insurance policies state that indemnities will be determined in accordance with the applicable crop endorsement and the actuarial table. The onion crop

endorsements set forth the applicable method of calculating indemnities. The endorsements provide that the market price utilized in the calculations may not be less than "local market price". Onion Endorsement at Paragraph 7. The endorsements make no mention of any salvage value or similar subtractions from benefits to be paid.

The farmers faced one weather crisis after another this growing season. Their 1996 onion crop was planted later than usual due to a cold, wet spring. In May, heavy rains ruined about 30 percent of the onion seedlings, requiring later replanting which was followed by a late frost and an early heat wave. The crisis turned to disaster when a pair of storms in June and July pelted the already weakened onion leaves with golf ball-sized hailstones. In mid-July tropical storm Bertha drenched Orange County with six inches of rain in half a day. Onion plants were knocked over, the roots exposed and rot crept into the onions. There was no way to save the onions and it was too late to replant.

Rainfall data compiled by the County Agency shows 30.84 inches of rainfall in Orange County during the first seven months of 1996, compared to 17.40 inches during the same period of 1995. Not only was the amount of rainfall significantly greater, but so was the frequency of precipitation. The County Agency reported precipitation on 43 days out of a possible 92 in May, June and July, 1996, as opposed to 27 days of precipitation in May through July 1995.

As a result of such adverse weather, the farmers' onion crops were destroyed, in whole or in major part.

The disaster was made worse when the County Agency determined indemnities due the farmers according to the following

Appendix D

calculation: Actual Production History multiplied by 50% (catastrophic coverage), multiplied by acreage grown, multiplied by the 1996 price set by FCIC (discussed in the next paragraph) resulting in the policy value, from which a purported "salvage value" (discussed below) was subtracted to yield the indemnity due the farmers.

FCIC seems to have arbitrarily determined the 1996 yellow onion price as $4.85 per hundred weight ("cwt"). The current actual market rate for yellow onions is $12-$18. FCIC then multiplies its deflated price of $4.85 cwt. by the 60% coverage to yield a price of $2.91 cwt. for 1996 yellow onions. Thus, the FCIC indemnity calculation is based on less than one-half the actual market price.

FCIC then subtracts its calculation of a factor it calls "salvage value", determined by multiplying the salvageable production (as determined by the federal crop insurance adjustor) by the FCIC-determined salvage rate of $8.00 per cwt (hereinafter the "salvage factor").

The salvage factor has no basis in the governing statute, the regulations, the general crop insurance policy, the onion endorsement, or anything else. Nor is it logical or equitable. By arbitrarily using an unrealistic market price and improperly subtracting a salvage factor, the FCIC proposes to pay benefits to farmers which are generally less than 10% of what they should be.

FCIC should be required to value the crop at the current actual market rate, and calculate indemnities according to the explicit language and purpose of the statute, regulations and insurance policies.

Appendix D

We understand that the suggestion has been made that the government might correct the problem for future years, but that is not a solution. These are insured losses the government is obligated to pay now; it is not a question of waiting for the next round of appropriations. These family farmers are not asking for governmental largesse. They paid for and entered into binding contracts of insurance with the government which require the government to indemnify against a portion of crops lost as a result of natural disaster. The Congressional purpose in providing this insurance is to reduce the devastation farmers suffer from such disasters and enable them to maintain their farms. FCIC is violating the statute and undermining the clear Congressional intent.

We ask that you assist the Orange County family onion farmers, and ensure that FCIC uses realistic current market value and abandon its deduction of "salvage value" when calculating the crop insurance indemnity due yellow onion producers for the destroyed 1996 crop.

Thank you for your consideration of this important matter. Our clients and my office will be pleased to provide any further information you may request.

Respectfully,

s/ Martin R. Gold
Martin R. Gold

MRG:sc

APPENDIX E — LETTER FROM KENNETH D. ACKERMAN OF THE U.S. DEPARTMENT OF AGRICULTURE TO MARTIN R. GOLD OF GOLD, FARRELL & MARKS DATED DECEMBER 11, 1996

UNITED STATES DEPARTMENT OF AGRICULTURE

Risk Management Agency

[Letterhead omitted]

DEC 11 1996

Mr. Martin R. Gold
Gold, Farrell & Marks
Attorneys and Counselors at Law
Forty-One Madison Avenue
New York, New York 10010-2201

Dear Mr. Gold:

Thank you for your letters of November 1, 1996, to Secretary Glickman and me, on behalf of onion farmers in Orange County, New York, who experienced severe damage to their onion crops as the result of adverse weather conditions during the spring and summer of 1996.

You questioned the legality of the method used by the Federal Crop Insurance Corporation (FCIC) to calculate insurance indemnities of farmers whose onion crops were insured under the catastrophic risk (CAT) endorsement of the standard crop insurance policy. Specifically you claim that the "salvage factor" "has no basis in the government statute, the regulations, the general crop insurance policy, the onion endorsement, or anything else." You also believe that the established market price of $4.85 per hundredweight (cwt) for onions is unrealistic.

Appendix E

In your letter, you refer, apparently, to terms used by the local Orange County Farm Service Agency (FSA) in its August 5 newsletter (copy enclosed). FCIC is overseen by the Risk Management Agency (RMA); however, FSA still services CAT policies in those States where private insurance companies cannot provide adequate service. Although FCIC and FSA sometimes use different terms, the process they describe is the same and is authorized by regulation. To assist you in recognizing similar terms, I have placed the terms used by FSA in parentheses after FCIC's.

The procedure for calculating indemnities on onions is outlined briefly under Section 7, "Claim for Indemnity," of the FCIC Onion Endorsement to the General Crop Insurance Policy. The value of the "production to count" (salvageable production) is calculated, according to Section 7 a (3), by "multiplying the total production of onions to be counted by the larger of your price election or the local market price at the time the onions are appraised." The price election, or established market price, is the projected price per cwt. of onions before packaging, and is set at the beginning of the crop year. The local market price (salvage rate) referred to in Section 7 of the policy is the current market price of the onions minus the allowable cost of marketing. The allowable $4.00 deduction for packaging is authorized in FCI-35 of the County Actuarial Documents placed on file each year prior to the cancellation date of the policy.

The FCIC *Onion Crop Handbook* and the *Loss Adjustment Manual* explain in detail the lengthy process used by adjustors in calculating an indemnity. On August 5, the FSA office in Orange County, New York, published a newsletter, *FSA News,* which included an example of an onion indemnity calculation. The example was incorrect. The value of marketable onions is

determined by multiplying their weight, after culling the original harvest for onions which cannot be sold because of their small size and poor quality, by the higher of the price election or the local market price (after $4.00 has been deducted for packaging) and then dividing this figure by the established market price. This amount (the adjusted production to count) is then subtracted from the total guarantee and the balance is multiplied by the producer's price election to determine the indemnity payment.

The correct calculation, which is described below, results in a higher indemnity for producers than indicated in the FSA newsletter and is the calculation used by loss adjustors in Orange County in computing indemnities on onion crops. The example below uses the same figures as those used in the *FSA News*.

(1) Adjusted Production (salvageable production) x Higher of the Price Election or the Local Market Field Run Price ÷ 100 % of the Price Election = Adjusted Production to count.

4,875 cwt. x $8.00 ÷ $4.85 = 8,041.2 cwt.

(2) Production Guarantee — Adjusted Production to Count x Producer's Price Election = Indemnity Payment

16,250 cwt. - 8,041.2 = 8,208.8 cwt. x $2.91 = $23.887.61 Indemnity Payment

You also claim that the established market price of $4.85 per cwt. is too low, since the "local market price" has ranged between $12 and $18 per cwt. in 1996. According to our representatives, the New York current market price for packaged onions has fluctuated this year between $8 and $12 per cwt., depending on their quality. For most years, the price election and local market

field prices were between $5 and $6 per cwt., in line with the established market price for the 1996 crop year. In 1996, however, losses were so significant that the local market price for packaged onions was set at $12. If FCIC were to establish the price election level expected after a loss has occurred, the amount of premium paid by the producer who obtains additional levels of coverage would also be based on that higher price level. Although this would not affect producers you represent, since the Government pays the entire premium on CAT policies, it would significantly affect producers who obtain additional levels of insurance and increase the overall cost of the program.

Finally, the farmers you represent chose to insure their onions at the CAT level of insurance. As a result, they only paid a $50 processing fee per crop per county, not a premium. Since CAT was intended to provide protection for catastrophic losses, the amount of coverage is minimal. It was never intended to fully compensated producer for the loss. Those onion producers who chose CAT only obtained coverage at 50 percent of the yield indemnified at 60 percent of the market price. This amount of coverage for CAT is set by the Federal Crop Insurance Act, as amended, and FCIC does not have the authority to increase this coverage.

Further, when producers signed up for this coverage, they knew exactly what their total amount of protection would be. If they were dissatisfied with this coverage, they could have obtained an additional level of coverage. Additional levels of coverage were available for up to 75 percent of the producer's actual average yield at 100 percent of the 1996 price election.

FCIC is currently reviewing the onion policy, and several changes have been proposed to make it more effective. Producers

will have the opportunity to comment on this policy before it is implemented. Further, for the 1996 crop year, FCIC has undertaken measures to assist onion producers. On September 11, 1996, Manager's Bulletin MGR-96-057 was released which amended the onion loss adjustment procedures to incorporate procedures for the adjustment of onions damaged by bacterial soft rot. Secretary Glickman has also declared Orange County a disaster area and eligible farmers may now obtain low-interest loans from FSA.

FCIC and RMA sympathize with the plight of Orange County onion farmers but believe that the Government is addressing the pertinent issues as quickly as possible. If you need additional information, please contact us.

Sincerely,

s/ Kenneth D. Ackerman

Kenneth D. Ackerman
Acting Administrator

Enclosure

APPENDIX F — LETTER FROM LARRY N. ATKINSON, DIRECTOR OF THE U.S. DEPARTMENT OF AGRICULTURE TO CHRISTOPHER PAWELSKI DATED DECEMBER 23, 1996

UNITED STATES DEPARTMENT OF AGRICULTURE

Risk Management Agency

Raleigh Regional Service Office

[Letterhead omitted]

December 23, 1996

Mr. Christopher Pawelski
RR 2, Box 269
Goshen, New York 10924-9785

Dear Mr. Pawelski

After thorough review and careful consideration, we are unable to approve the onion claim as suggested by the alternate FCI-74 claim form you signed on November 7, 1996. The original claim as worked and signed by the loss adjuster is correct according to procedure, therefore, we approve that claim as final.

We do not have the latitude to modify policy language. The policy specifically states that we will deduct the dollar value of any marketable production from your total liability. The Onion Endorsement (88-50) explains in paragraph 7a(3) that we determine any dollar amount subtracted from liability "by multiplying the total production of onions to be counted by the larger of your price election or the local market price . . ." Since the local market price was higher than the price election, no indemnity may unfortunately result although you incurred a loss in production.

Appendix F

We deeply regret that we could not render a more favorable decision. If you do not agree with our findings, you have the following options.

If you have any questions concerning our decision and desire further explanation, you may seek reconsideration by filing a written request reconsideration with this office within 30 days from the date of this letter.

If you do not request reconsideration as outlined above, you may request an appeal. Such requests must be sent within 30 days of your receipt of this letter to: Regional Director, National Appeals Division, Eastern Region, 3500 DePauw Boulevard, Suite 2052, Indianapolis, Indiana 46268.

You may wish to consider mediation or other forms of alternative dispute resolution (ADR) of the issues raised by this decision. Informal mediation or ADR may enable us to narrow and resolve these issues by agreement. If you request mediation or ADR, and resources are available, Risk Management Agency (RMA) will participate in the mediation or ADR process. To request mediation or ADR, notify this office in writing at the following address

Larry N Atkinson, Director
Raleigh Regional Service Office
4407 Bland Road, Suite 160
Raleigh, NC 27609
(919) 790-2749
(919) 790-2999 FAX

The written notice must be postmarked or faxed by you not later than 15 days after the date of this letter. We will tell you the extent to which resources are available for mediation or ADR, and the

procedures and other information concerning mediation or ADR. Mediation and ADR do not replace nor limit your right to pursue further appeal to the National Appeals Division.

Sincerely,

s/ Larry N. Atkinson
LARRY N. ATKINSON
Director

cc: Marc A. Smith, NY State FSA Office
Neal W. Needleman, Orange Co NY FSA

APPENDIX G — LETTER FROM LARRY N. ATKINSON, DIRECTOR OF THE U.S. DEPARTMENT OF AGRICULTURE TO JAMES BASTEK DATED JANUARY 22, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE

Risk Management Agency

Raleigh Regional Service Office

[Letterhead omitted]

January 22, 1997

Mr. James Bastek
RR 1, Box 584A
Westtown, New York 10998-9772

Dear Mr. Bastek:

After thorough review and careful consideration, we are unable to approve your alternate onion claim form as signed on November 8, 1996. Except for an adjustment in production, the original claim as worked and signed by the loss adjuster is correct according to procedure. The correction is to the stored production of yellow jumbos in ten boxes from various fields. After applying the hundredweight (cwt.) factor of .338 that was inadvertently omitted, the correct production is 43.7 cwt. instead of 129.1 cwt.

The insurance selected was the minimum level of coverage available (Catastrophic Risk Protection, or CAT), which is provided without a premium for only a $50 processing fee. Since CAT was intended to provide only basic protection for widespread catastrophic events (e.g., when the entire crop is wiped out), the coverage is minimal. Legislation has set this type of coverage; the Risk Management Agency does not have the authority to alter the 50% coverage or

price levels. However, growers had the option before the sales closing date of purchasing additional coverage that would have offered much more protection.

An established price of $4.85 for yellows and $6.85 for reds was based on available market data and reflects the expected value per hundredweight of onions before the power incurs harvesting costs (i.e., an in field price). We have allowed a cost of $4.00 per cwt. for harvesting and handling which would suggest a farm gate price of $8.85 for yellow globe onions and $10.85 for reds. Although market prices this year may have been higher as influenced by reduced production, the established price was published and available to policyholders well before the deadline for cancellation or purchasing additional insurance. The price becomes part of the insurance contract and we cannot change it once insurance attaches.

We also do not have the latitude to modify policy language regarding salvage value determination. The policy specifically states that the dollar value of any marketable production will be deducted from your total liability. Paragraph 7a(3) of the Onion Endorsement (88-50) explains that we determine any dollar amount to be subtracted from liability "by multiplying the total production of onions to be counted by the larger of your price election or the local market price . . ." If the local market price is higher than the published price election, this may unfortunately result in no indemnity although you incurred a loss in production.

We deeply regret that we could not render a more favorable decision. If you do not agree with our findings you have the following options:

If you have any questions concerning our decision and desire further explanation, you may seek full reconsideration by filing

a written request reconsideration with this office within 30 days from the date of this letter.

If you do not request reconsideration as outlined above, you may request an appeal. Such requests must be sent within 30 days of your receipt of this letter to: Regional Director, National Appeals Division. Eastern Region, 3500 DePauw Boulevard, Suite 2052, Indianapolis, Indiana 46268.

You may wish to consider mediation or other forms of alternative dispute resolution (ADR) of the issues raised by this decision. Informal mediation or ADR may enable us to narrow and resolve these issues by agreement. If you request mediation or ADR, and resources are available, Risk Management Agency (RMA) will participate in the mediation or ADR process. To request mediation or ADR, notify this office in writing at the following address:

Larry N. Atkinson, Director
Raleigh Regional Service Office
4407 Bland Road, Suite 160
Raleigh, NC 27609
(919) 790-2749
(919) 790-2999 FAX

The written notice must be postmarked or faxed by you no later than 15 days after the date of this letter. We will tell you the extent to which resources are available for mediation or ADR, and the procedures and other information concerning mediation or ADR. Mediation and ADR do not replace nor limit your right to pursue further appeal to the National Appeals Division.

Sincerely,

LARRY N. ATKINSON
Director

Appendix G

cc: Marc: A. Smith, NY State FSA Office
Ned W. Needleman, Orange Co NY FSA
PSB File
RSO File
Reader File

RMA:PSB:ADC:S:\WPDOCS\BASTEY-WPD

APPENDIX H — LETTER FROM LARRY N. ATKINSON, DIRECTOR OF THE U.S. DEPARTMENT OF AGRICULTURE TO RUSSELL KOWAL DATED JANUARY 22, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE

Risk Management Agency

Raleigh Regional Service Office

[Letterhead omitted]

January 22, 1997

Mr. Russell Kowal
RR 2, Box 366
Goshen, New York 10924-9785

Dear Mr. Kowal:

After thorough review and careful consideration, we are unable to approve your alternate onion claim form as signed on November 12, 1996. The original claim as worked and signed by the loss adjuster is correct according to procedure.

The insurance selected was the minimum level of coverage available (Catastrophic Risk Protection, or CAT), which is provided without premium for only a $50 processing fee. Since CAT was intended to provide only basic protection for widespread catastrophic events (e.g., when the entire crop is wiped out), the coverage is minimal. Legislation has set this type of coverage; the Risk Management Agency does not have the authority to alter the 50% coverage or 60% price levels. However, growers had the option before the sales closing date to purchase additional coverage that would have offered much more protection.

Appendix H

An established price of $4.85 for yellows and $6.85 for reds was based on available market data and reflects the expected value per hundredweight of onions before the grower incurs harvesting costs (i.e., an in field price). We have allowed a cost of $4.00 per cwt. for harvesting and handling which would suggest a farm gate price of $8.85 for yellow globe onions and $10.85 for reds. Although market prices this year may have been higher as influenced by reduced production, the established price was published and available to policyholders well before the deadline for cancellation or purchasing additional insurance. The price becomes part of the insurance contract and we cannot change it once insurance attaches.

We also do not have the latitude to modify policy language regarding salvage value determination. The policy specifically states that the dollar value of any marketable production will be deducted from your total liability. Paragraph 7a(3) of the Onion Endorsement (88-50) explains that we determine any dollar amount to be subtracted from liability "by multiplying the total production of onions to be counted by the larger of your price election or the local market price . . ." If the local market price is higher than the published price election, this may unfortunately result in no indemnity although you incurred a loss in production.

We deeply regret that we could not render a more favorable decision. If you do not agree with our findings, you have the following options:

> If you have any questions concerning our decision and desire further explanation, you may seek reconsideration by filing a written request reconsideration with this office within 30 days from the date of this letter.

Appendix H

If you do not request reconsideration as outlined above, you may request an appeal. Such requests must be sent within 30 days of your receipt of this letter to: Regional Director, National Appeals Division, Eastern Region, 3500 DePauw Boulevard, Suite 2052, Indianapolis, Indiana 46268.

You may wish to consider mediation or other forms of alternative dispute resolution (ADR) of the issues raised by this decision. Informal mediation or ADR may enable us to narrow and resolve these issues by agreement. If you request mediation or ADR, and resources are available, Risk Management Agency (RMA) will participate in the mediation or ADR process. To request mediation or ADR, notify this office in writing at the following address:

Larry N. Atkinson, Director
Raleigh Regional Service Office
4407 Bland Road, Suite 160
Raleigh, NC 27609
(919) 790-2749
(919) 790-2999 FAX

The written notice must be postmarked or faxed by you not later than 15 days after the date of this letter. We will tell you the extent to which resources are available for mediation or ADR, and the procedures and other information concerning mediation or ADR. Mediation and ADR do not replace nor limit your right to pursue further appeal to the National Appeals Division.

Sincerely,

LARRY N. ATKINSON
Director

Appendix H

cc: Marc A. Smith, NY State FSA Office
Neal W. Needleman, Orange Co NY FSA
PSB File
RSO File
Reader File

RMA:PSB:ADC:S:\WPDOCS\KOWAL.WPD

APPENDIX I — EXCERPTS OF TRANSCRIPT OF ORAL ARGUMENT DATED JANUARY 29, 1998

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO.: 97-6221
January 29, 1998

BASTEK, et al.,

Appellants

-vs-

FEDERAL CROP INSURANCE CORPORATION,

Appellee

TRANSCRIPT OF CIVIL CAUSE FOR MOTION

B E F O R E: GUIDO CALABRESI, Circuit Judge
JOSE A. CABRANES, Circuit Judge
G.W. HEANEY, District Judge

* * *

[Commencing at page 18]

* * *

JUDGE CABRANES: And you have the authority to waive any timeliness bar.

MS. CHANG: Well, it may be that we have the authority to waive it, but we have had no such request. And in fact, given the nature of the claims here and the Government's view that the appellants are not entitled to the ruling that they seek, I could not say whether the agency would entertain such a waiver.

JUDGE CALABRESI: Well, now, wait a second, you think that you will not waive it because the claims are so silly that there's no point in their going to the NAD?

MS. CHANG: I'm sorry? I [indiscernible]

JUDGE CALABRESI: There is no point in waiver because the argument that they are making is an argument that the NAD couldn't possibly buy, so there's no point in sending it to the NAD.

MS. CHANG: [indiscernible]

JUDGE CALABRESI: I thought that that was their argument for not bothering to go there in the first place.

MS. CHANG: Well, Your Honor, respectfully, the appellant's have never presented any evidence that the [19] Government was wrong. [indiscernible]

JUDGE CABRANES: Well, but that's not the

JUDGE CALABRESI: Now we're back to the merits.

MS. CHANG: [indiscernible]

JUDGE CABRANES: But that's not the question. Why don't you just answer the question that Judge Calabresi put to you?

MS. CHANG: I'd say only that the agency may not entertain the idea of waiver at this point, when the appellants have chosen strategically to disregard the exhaustion procedures.

JUDGE CABRANES: You're simply saying that as a litigant whose consent would be required in the event this timeliness question arose before an authoritative decision maker in the agency, that you as a litigant do not think that you will waive that bar.

MS. CHANG: That's correct. I'm not suggesting that the issue was predetermined, because it was never presented to anyone. And —

JUDGE CABRANES: But doesn't it seem to you a little odd to ask them to submit 50 plus applications at the same time? I mean, they do have common issues, and there is a reason for thinking in terms of a class action, which couldn't be entertained by the Department of Agriculture.

MS. CHANG: Your Honor, they do, in fact, allege that [20] they have common issues, and it may be that as a general statutory question —

JUDGE CALABRESI: Well, there is a common issue. I mean, there is a common issue. I don't agree, I don't think, with appellants that it's a common issue that — that some of the issues are common. But the issue of whether the contract that was put out by the FCIC was ultra vires is a common issue,

whether that contract was one that was permitted by the law. Isn't that a common issue?

MS. CHANG: That would be a common issue as to all members of the farming industry —

JUDGE HEANEY: And whether you can deduct salvage value.

MS. CHANG: — nationwide, but that's not what's at issue here, whether these class — this particular class had common issues.

JUDGE CALABRESI: Can we learn anything - do we have anything that we would benefit from, if — by having an opinion as a court, an opinion of the NAD interpreting this statute?

MS. CHANG: Yes. The Government's position is that the purposes of exhaustion would have been furthered by the pursuit of the administrative appeals [indiscernible]

JUDGE CALABRESI: Can you be a little specific about that? What is it that we would learn?

MS. CHANG: The congressional scheme here anticipated [21] that there would be classes, one would think, of farmers, that there were not individual farmers of single crops. The idea that exhaustion would be required in circumstances contemplates the fact that individual farmers would have information to put forth regarding their claims.

With respect to the record below, there was no development whatsoever because of the failure of exhaustion as to whether the expected market price was accurate at the time of contract.

This is an issue that the appellants have taken in their complaint, that the price that the local Federal Crop Insurance Agency set for onions in Orange County was too low.

In addition, they take issue with whether the expected market price was, in fact — it should have been the actual market price, that that should have been the term in the agreement. And the rationale for how the Federal Crop Insurance Corporation determines what terms to use in their contracts should have been a matter of the factual development of the record.

In addition, as Your Honor pointed out, the amount of the out-of-pocket cost deduction for packaging was also challenged by the appellants in their complaint. And whether the specific amount, or whether in this particular class of onion farmers —

JUDGE CALABRESI: But if that were the issue, we could perfectly well say okay, they failed to exhaust that, it [22] is now administratively barred. So that that issue, which they would have had a duty to exhaust, has now been exhausted by operation of law, and we can still permit them to treat those issues which were originally exhausted as — that is, they had no duty to appeal, and can come directly with.

We can sever that, as we do any number of times, with respect to issues which were unexhausted if they then had been either dropped or they had been exhausted by operation of law.

MS. CHANG: That may, in fact, be possible. However, the issues of the contract terms and its operation still remain an issue even for this general question of law, because the statute that is at issue is section 1508 (b) (2) regarding catastrophic risk protection. And what appellants have failed

to point out to Your Honors is that the type of coverage that is provided states that it will be, generally, as quoted here:

> The Federal Crop Insurance Corporation shall offer producer coverage for a 50 percent loss in yield by an individualized yield or area yield basis, indemnified at 60 percent of the expected market price, or a comparable coverage.

And whether this coverage was comparable or not comparable, since appellants contend that it is not consistent with the organic statute, is a question that should have been resolved as a factual matter below —

JUDGE CALABRESI: I see. Your argument is that the [23] comparability, —

MS. CHANG: and as a matter of agency expertise.

JUDGE CALABRESI: that the comparability of what they did to what the statute allowed is a factual matter as to which the NAD would have had authority,

MS. CHANG: Yes.

JUDGE CALABRESI: and would have been helpful to us.

JUDGE HEANEY: All right, what would your position have been if they had raised this issue in an administrative proceeding? Would your position have been look, you signed a contract that this was what we were going to do, and so you have agreed that our method of determining comparability is binding on everybody?

MS. CHANG: Well, I can't say what the position would have been. I'm sure that the appellants [indiscernible] had put forth information suggesting that this is not comparable, or that the expected market price was not appropriate, that it would have been considered fairly by the National Appeals Division and all other agencies, Your Honor.

JUDGE CABRANES: If your position had been the position stated by Judge Heaney, would the decision making authorities in the Department of Agriculture, would they have been in a position to disagree with that position and to decide in favor of the petitioners? [24]

MS. CHANG: When you say the decision makers

JUDGE CABRANES: Well, I mean, Judge Heaney asked you what your position would be and stated what it might have been in opposition to your adversaries'. Assuming for the argument that you had gone to the NAD and you had taken the position that Judge Heaney identified, in opposition to your adversaries, I take it the NAD then is able to make a decision on the merits, and you can lose. Right?

MS. CHANG: Yes.

JUDGE CABRANES: I mean, you don't win all your cases before the NAD, do you?

MS. CHANG: No.

JUDGE CABRANES: No, I'm just trying to figure out, what kind of an outfit is this. I mean, do they rubber stamp every position you take?

MS. CHANG: No. In fact, according to the statute and by regulation they will conduct hearings as well.

JUDGE CABRANES: They perform adjudicative functions.

MS. CHANG: Yes. And there will be witnesses that can be presented, evidence that can be presented, documents that can be seen and submitted.

JUDGE CABRANES: Now, let me ask you, if these 50-odd petitions had been filed with the NAD, would they necessarily have been handled by the same person, or would a decision by one — well, how would it be handled? What kind of a group is [25] this?

MS. CHANG: There are hearing officers within the National Appeals Division.

JUDGE CABRANES: Would it have gone to 50 different — or a handful of different hearing officers?

MS. CHANG: Yes, more than likely than not, it would not have been decided by a single hearing officer.

JUDGE CABRANES: And what if their decisions had been in conflict with each other, some of the farmers won, some of them lost?

MS. CHANG: It may be that then there would have been a —

JUDGE CABRANES: The hearing officers —

MS. CHANG: [indiscernible] I think would have accounted for that.

JUDGE CABRANES: The hearing officers issue recommended decisions?

MS. CHANG: I'm sorry?

JUDGE CABRANES: The hearing officers, are they the final decision makers of the NAD, or do they make recommendations to the NAD?

MS. CHANG: They're not the final decision makers. There are — they would make a decision, and the party that lost could pursue further to the director of the National Appeals Division. [26]

JUDGE CABRANES: So — who has an adjudicative role here hearing the appeal, or considering the appeal.

MS. CHANG: Yes.

JUDGE CABRANES: So if some of the onion workers prevailed, they will have won. The others presumably would submit an appeal to the director.

MS. CHANG: At that point one would assume that the director would decide —

JUDGE CABRANES: And then you might appeal.

MS. CHANG: — you know, uniformly for all the claimants.

JUDGE CABRANES: So in fact, in those circumstances, the class-wide concerns would ultimately be resolved in fact by the NAD.

MS. CHANG: Yes. That is what the Government submits would have happened.

JUDGE CABRANES: The hearing officer is somewhat akin, say, to an ALJ in another agency, like the NLRB or the EPA.

MS. CHANG: Yes.

JUDGE CABRANES: And there, even when you have different decisions of ALJs in the NLRB, it goes up to the board itself, and the board presumably resolves the conflicts in decisions by ALJs. Is that right?

MS. CHANG: That's correct. And the statute provides [27] for the timing of those decisions as well, and it anticipates that this will not be a process that lags on, as appellants assume [indiscernible]

JUDGE CALABRESI: Then I want to go back to Judge Heaney's question, and that was suppose that this were appealed to the NAD, and the position that was taken by the Department in opposition to the appeal was it doesn't matter whether this is comparable or not, because they agreed by contract that this was alright, that the FCIC could determine itself what was comparable.

JUDGE HEANEY: Right.

JUDGE CALABRESI: Would the NAD have any authority at all to say that is not so?

JUDGE CABRANES: It's roughly the same question I asked you before. Does the NAD have the authority to say you lose?

MS. CHANG: That I lose?

JUDGE CABRANES: Yes, you, as the department, quote, the department.

JUDGE CALABRESI: Yes.

MS. CHANG: Yes. It could be

* * *

APPENDIX J — RELEVANT STATUTES AND REGULATIONS

STATUTES

Title 7, United States Code Chapter 36 — Crop Insurance

§ 1502. Purpose and definitions

(a) Purpose

It is the purpose of this chapter to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.

§ 1508. Crop Insurance

* * *

(b) Catastrophic risk protection

(1) In general

The Corporation shall offer a catastrophic risk protection plan to indemnify producers for crop loss due to loss of yield or prevented planting, if provided by the Corporation, when the producer is unable, because of drought, flood, or other natural disaster (as determined by the Secretary), to plant other crops for harvest on the acreage for the crop year.

Appendix J

(2) Amount of coverage

(A) In general

Subject to subparagraph (B) —

(i) in the case of each of the 1995 through 1998 crop years, catastrophic risk protection shall offer a producer coverage for a 50 percent loss in yield, on an individual yield or area yield basis, indemnified at 60 percent of the expected market price, or a comparable coverage (as determined by the Corporation);

(B) Reduction in actual payment

The amount paid to a producer on a claim under catastrophic risk protection may reflect a reduction that is proportional to the out-of-pocket expenses that are not incurred by the producer as a result of not planting, growing, or harvesting the crop for which the claim is made, as determined by the Corporation.

* * *

(4) Sale of catastrophic risk coverage

(A) In general

Catastrophic risk coverage may be offered by

(i) approved insurance providers, if available in an area; and

(ii) at the option of the Secretary that is based on considerations of need, local offices of the Department.

* * *

(ii) Coverage by approved insurance providers

To the extent that catastrophic risk protection coverage by approved insurance providers is sufficiently available in a State (or a portion of a State) as determined by the Secretary, only approved insurance providers may provide the coverage in the State or portion of the State.

* * *

(5) Administrative fee

(A) Fee required

Producers shall pay an administrative fee for catastrophic risk protection. The administrative fee for each producer shall be $50 per crop per county, but not to exceed $200 per producer per county up to a maximum of $600 per producer for all counties in which a producer has insured crops. The administrative fee shall be paid by the producer at the time the producer applies for catastrophic risk protection.

* * *

Appendix J

(10) Simplification

(A) Catastrophic risk protection plans

In developing and carrying out the policies and procedures for a catastrophic risk protection plan under the chapter, the Corporation shall, to the maximum extent practicable, minimize the paperwork required and the complexity and costs of procedures governing applications for, processing, and servicing of the plan for all parties involved.

* * *

(C) General coverage levels

* * *

(5) Price Level

The Corporation shall establish a price level for each commodity on which insurance is offered that —

(A) shall not be less than the projected market price for the commodity (as determined by the Corporation); or

(B) at the discretion of the Corporation, may be based on the actual market price at the time of harvest (as determined by the Corporation).

* * *

Appendix J

(e) Payment of portion of premium by Corporation

(1) In general

For the purpose of encouraging the broadest possible participation of producers in the catastrophic risk protection provided under subsection (b) of this section and the additional coverage provided under subsection (c) of this section, the Corporation shall pay a part of the premium in the amounts provided in accordance with this subsection.

* * *

(h) Submission of policies and materials to board

* * *

(3) Review and approval by the board

A policy or other material submitted to the Board under this subsection shall be reviewed by the Board and, if the Board finds that the interests of producers are adequately protected and that any premiums charged to the producers are actuarially appropriate, shall be approved by the Board for reinsurance and for sale to producers as an additional choice at actuarially appropriate rates and under appropriate terms and conditions. The Corporation may enter into more than 1 reinsurance agreement with the approved insurance provider simultaneously to facilitate the offering of the new policies.

* * *

Appendix J

(j) Claims for losses

* * *

(2) Denial of claims

(A) In general

Subject to subparagraph (B), if a claim for indemnity is denied by the Corporation or an approved provider, an action on the claim may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located.

* * *

SUBCHAPTER VIII — NATIONAL APPEALS DIVISION

§ 6912(e). Exhaustion of administrative appeals

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against —

(1) the Secretary;

(2) the Department; or

(3) an agency, office, officer, or employee of the Department.

Appendix J

§ 6991. Definitions

For purposes of this subchapter:

(1) Adverse decision

The term "adverse decision" means an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant. The term does not include a decision over which the Board of Contract Appeals has jurisdiction.

* * *

§ 6992. National Appeals Division and Director

(a) Establishment of Division

The secretary shall establish and maintain an independent National Appeals Division within the Department to carry out this subchapter.

* * *

(d) Determination of appealability of agency decisions

If an officer, employee, or committee of any agency determines that a decision is not appealable and a participant appeals the decision to the Director, the Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a

matter of general applicability and thus not subject to appeal. The determination of the Director as to whether a decision is appealable shall be administratively final.

* * *

§ 6994. Notice and opportunity for hearing

Not later than 10 working days after an adverse decision is made that affects the participant, the Secretary shall provide the participant with written notice of such adverse decision and the rights available to the participant under this subchapter or other law for the review of such adverse decision.

* * *

§ 6996. Right of participants to Division hearing

(a) Appeal to Division for hearing

Subject to subsection (b) of this section, a participant shall have the right to appeal an adverse decision to the Division for an evidentiary hearing by a hearing officer consistent with section 6997 of this title.

* * *

Appendix J

§ 6997. Division hearings

(a) General powers of Director and hearing officers

(1) Access to case record

The Director and hearing officer shall have access to the case record of any adverse decision appealed to the Division for a hearing.

* * *

(c) Location and elements of hearing

* * *

(2) Evidentiary hearing

The evidentiary hearing before a hearing officer shall be in person, unless the appellant agrees to a hearing by telephone or by a review of the case record. The hearing officer shall not be bound by previous findings of fact by the agency in making a determination.

(3) Information at hearing

The hearing officer shall consider information presented at the hearing without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made. The hearing officer shall leave the record open after the hearing for a reasonable period of time to allow the submission of

information by the appellant or the agency after the hearing to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised by the agency or appellant.

* * *

(d) Determination notice

The hearing officer shall issue a notice of the determination on the appeal not later than 30 days after a hearing or after receipt of the request of the appellant to waive a hearing, except that the Director may establish an earlier or later deadline. If the determination is not appealed to the Director for review under section 6998 of this title, the notice provided by the hearing officer shall be considered to be a notice of an administratively final determination.

* * *

§ 6998. Director review of determination of hearing officers

(a) Requests for Director review

(1) Time for request by appellant

Not later than 30 days after the date on which an appellant receives the determination of a hearing officer under section 6997 of this title, the appellant shall submit a written request to the Director for review of the determination in order to be entitled to a review by the Director of the determination.

* * *

(b) Determination of Director

The Director shall conduct a review of the determination of the hearing officer using the case record, the record from the evidentiary hearing under section 6997 of this title, the request for review, and such other arguments or information as may be accepted by the Director. Based on such review, the Director shall issue a final determination notice that upholds, reverses, or modifies the determination of the hearing officer. However, if the Director determines that the hearing record is inadequate, the Director may remand all or a portion of the determination for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing. The Director shall complete the review and either issue a final determination or remand the determination not later than —

(1) 10 business days after receipt of the request for review, in the case of a request by the head of an agency for review; or

(2) 30 business days after receipt of the request for review, in the case of a request by an appellant for review.

(c) Basis for determination

The determination of the hearing officer and the Director shall be based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register

and in effect on the date of the adverse decision or the date on which the acts that give rise to the adverse decision occurred, whichever date is appropriate.

* * *

§ 6999. Judicial review

A final determination of the Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5.

* * *

REGULATIONS

7 C.F.R. SUBTITLE A, PART 11 — NATIONAL APPEALS DIVISION RULES OF PROCEDURE

§ 11.1 Definitions

For purposes of this part:

Adverse decision means an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations. The

term does not include a decision over which the Board of Contract Appeals has jurisdiction.

* * *

Appeal means a written request by a participant asking for review by the National Appeals Division of an adverse decision under this part.

* * *

Participant means any individual or entity who has applied for, or whose right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which the regulations in this part apply is affected by a decision of such agency. With respect to guaranteed loans made by FSA, both the borrower and the lender jointly must appeal an adverse decision except that the denial or reduction of a final loss payment to a lender shall be appealed by the lender only. The term does not include persons whose claim(s) arise under:

* * *

§ 11.6 Director review of agency determination of appealability and right of participants to Division hearing.

(a) *Director review of agency determination of appealability.* (1) Not later than 30 days after the date on which a participant receives a determination from an agency that an agency decision is not appealable, the participant must submit a written request to the

Director to review the determination in order to obtain such review by the Director.

(2) The Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal, and will issue a final determination notice that upholds or reverses the determination of the agency. This final determination is not appealable. If the Director reverses the determination of the agency, the Director will notify the participant and the agency of that decision and inform the participant of his or her right to proceed with an appeal.

* * *

(b) *Appeals of adverse decisions.* (1) To obtain a hearing under §11.8, a participant personally must request such hearing not later than 30 days after the date on which the participant first received notice of the adverse decision or after the date on which the participant receives notice of the Director's determination that a decision is appealable. In the case of the failure of an agency to act on the request or right of recipient, a participant personally must request such hearing not later than 30 days after the participant knew or reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations, or where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency's failure to act.

(2) A request for a hearing shall be in writing and personally signed by the participant, and shall include a copy of the adverse decision to be reviewed, if available, along with a brief statement of the participant's reasons for believing that the decision, or the agency's failure to act, was wrong. The participant also shall send a copy of the request for a hearing to the agency, and may send a copy of the adverse decision to be reviewed to the agency, but failure to do either will not constitute grounds for dismissal of the appeal. Instead of a hearing, the participant may request a record review.

* * *

§ 11.9 Director review of determinations of Hearing Officers

(a) *Requests for Director review.* (1) Not later than 30 days after the date on which an appellant receives the determination of a Hearing Officer under §11.8, the appellant must submit a written request, signed personally by the named appellant, to the Director to review the determination in order to be entitled to such review by the Director. Such request shall include specific reasons why the appellant believes the determination is wrong.

* * *

§ 11.10 Basis for determination

(a) In making a determination, the Hearing Officers and the Director are not bound by previous

findings of facts on which the agency's adverse decision was based.

* * *

§ 11.13 Judicial review

(a) A final determination of the Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of title 5, United States Code.

(b) An appellant may not seek judicial review of any agency adverse decision appealable under this part without receiving a final determination from the Division pursuant to the procedures of this part.

7 C.F.R. CH. IV, PART 402 — CATASTROPHIC RISK PROTECTION ENDORSEMENT

* * *

§ 402.1 General statement.

The Federal Crop Insurance Act as amended by the Federal Crop Insurance Reform Act of 1994 (the "Act") requires the Federal Crop Insurance Corporation ("FCIC") to implement a catastrophic risk protection plan of . . .

* * *

Appendix J

§ 402.4 Catastrophic Risk Protection Endorsement Provisions.

* * *

4. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities

(a) Notwithstanding any provision contained in any other policy document, for the 1995 through 1998 crop years, coverage will be equal to fifty percent (50%) of your approved yield indemnified at sixty percent (60%) of the expected market price, or a comparable coverage as established by FCIC.

7 C.F.R. CH. VII, PART 780 — APPEAL REGULATIONS

* * *

§ 780.2 Applicabilty.

(a)(1) Except as provided in other regulations, this part applies to decisions made under programs and by agencies, as set forth herein:

* * *

(iii) Decisions made by personnel of the Federal Crop Insurance Corporation ("FCIC") or FSA with respect to contracts of insurance insured by FCIC and the noninsured crop disaster assistance program;

(iv) Decisions made by personnel of FCIC or FSA with respect to contracts of insurance provided by private insurance carriers and reinsured by FCIC under the provisions of the Federal Crop Insurance Act; and

* * *

(c) No reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants.

(d) Mathematical formulas established under a statute or program regulations, and decisions based solely on the application of those formulas, are not appealable under this part.

(e) Only a participant may seek reconsideration or appeal under this part.

* * *